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Supreme Court, U.S.
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No. 97-178

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC. AND
PACIFIC INSURANCE COMPANY, LTD.,
Respondents.

BRIEF IN OPPOSITION

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PACIFIC INSURANCE COMPANY, LTD.

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No. 97-178

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC. AND
PACIFIC INSURANCE COMPANY, LTD.,
Respondents.

BRIEF IN OPPOSITION

I. QUESTIONS PRESENTED.

UNITED AIRLINES, INC., Respondent ("Employer") and PACIFIC INSURANCE COMPANY, LTD., Respondent ("Insurance Adjuster") (herein sometimes collectively referred to as "Respondents") assert there is no valid federal question presented for review by DIANA FAIRECHILD ("Petitioner").

II. OFFICIAL AND UNOFFICIAL REPORTS.

Copies of the official and unofficial reports are presented in the "Appendix" as follows:

Notice And Judgment On Appeal, Supreme Court of the State of Hawaii dated February 13, 1997.

Complaint For Damages, Superior Court of the State of California for the City and County of San Francisco dated February 27, 1996.

Order Denying Claimant-Appellant's Motion For Reconsideration And Reopening Of Decision Or [sic] Order, Labor and Industrial Relations Appeals Board dated January 19, 1995.

Decision And Order, Director of Labor and Industrial Relations dated February 23, 1990.

III. BASIS FOR JURISDICTION.

Petitioner seeks to invoke jurisdiction pursuant to 28 U.S.C. Section 1257(a), Rule 13.1, Revised Rules of the Supreme Court of the United States and Article III and Amendment XIII of the United States Constitution.

Respondents assert this Honorable Court has no jurisdiction to review the order of the Supreme Court of Hawaii because Petitioner did not affirmatively or properly present, on the face of the record, a federal question constituting an appropriate ground for review. The alleged federal questions were neither timely raised nor specifically

decided by the Labor and Industrial Relations Appeals Board ("Appeals Board") and the Hawaii Supreme Court.

IV. STATEMENT OF THE CASE.

On January 19, 1989, Petitioner filed a WC-5 Employee's Claim For Workers' Compensation Benefits alleging she was "environmentally allergic" due to direct and secondary pesticide exposure on aircraft. [R, p. 5]. A hearing was held at the Department of Labor and Industrial Relations, Disability Compensation Division on September 27, 1990 to determine the compensability of this claim. [R, p. 49]. By Decision And Order of the Director of Labor and Industrial Relations ("Director") dated February 23, 1990, Petitioner's claim for workers' compensation benefits was denied. [R, pp. 437-438; Appendix pp. 20A-25A].

Petitioner appealed the Director's Decision And Order of February 23, 1990 to the Appeals Board on March 7, 1990. [R, p. 451]. Hearings were held by the Appeals Board on July 18, 1991, September 16, 1991 and September 25, 1991 to determine the sole issue of whether Petitioner sustained an injury arising out of and in the course of her employment with Employer on or about December 20, 1987 compensable under Chapter 386, Hawaii Revised Statutes.

The Appeals Board issued a Proposed Decision And Order dated October 3, 1994. [R, pp. 1155-1170]. Petitioner filed her Exceptions And Arguments To Findings Of Fact And Conclusions Of Law on October 18, 1994. [R, pp. 1173-1231]. Respondents filed their Exceptions To Proposed Decision And Order on October 19, 1994. [R,

pp. 1232-1237]. The Appeals Board filed its Decision And Order on November 2, 1994, and determined the claimed injury was not established due to the lack of reliable or proven medical or scientific basis to support or confirm the diagnosis of multiple chemical sensitivity. The Appeals Board concluded Petitioner failed to establish an injury compensable under Hawaii law and affirmed the Director's Decision of February 23, 1990 denying the workers' compensation claim. [R, pp. 1252-1568; Appendix E to Petitioner's Writ Of Certiorari]. Petitioner filed a Motion For Reconsideration And Reopening Of Decision Or [sic] Order on December 1, 1994. [R, pp. 1275-1308]. On January 19, 1995, the Appeals Board filed its Order Denying Claimant-Appellant's Motion For Reconsideration And Reopening Of Decision Or (Sic) Order. [R, pp. 1329-1330; Appendix pp. 18A-19A]. Claimant filed a Notice Of Appeal And Designation Of Record On Appeal to the Hawaii Supreme Court on February 9, 1995. [R, pp. 1335-1339]. After briefs were submitted by the parties, the Hawaii Supreme Court filed its Memorandum Opinion on January 16, 1997 affirming the Appeals Board Decision And Order denying compensation to Petitioner. [Appendix A to Petitioner's Writ Of Certiorari]. Petitioner filed a Motion For Reconsideration to the Hawaii Supreme Court on January 27, 1997 which was denied by Order dated February 5, 1997. [Appendix B to Petitioner's Writ Of Certiorari]. Notice And Judgment On Appeal were entered on February 13, 1997 [Appendix pp. 2A-6A].

Petitioner filed a Complaint For Damages against Employer in the Superior Court of the State of California for the City and County of San Francisco on February 26, 1996. [Appendix pp. 7A-17A]. On May 13, 1996, the

case was removed by Employer to the United States District Court for the Northern District of California. Upon motion by Employer, the United States District Court filed its Order Granting Defendant's Motion For Judgment On The Pleadings on December 20, 1996, indicating the action's connection to California was tenuous at best and the applicable law was Hawaii's workers' compensation statute. The Court concluded Petitioner's claim was barred under the Hawaii workers' compensation statute which recognized no exception for an employer's fraudulent concealment. [Appendix C to Petitioner's Writ Of Certiorari].

Petitioner filed a Petition For Writ Of Certiorari To The Supreme Court Of The State of Hawaii on or about July 31, 1997. The sole issue determined by the Director, the Appeals Board and the Hawaii Supreme Court was whether Petitioner sustained a compensable work injury arising out of and in the course of her employment with Employer on December 20, 1987 pursuant to Chapter 386, Hawaii Revised Statutes. A federal question was neither presented by Petitioner nor passed upon by the State administrative agencies and the Hawaii Supreme Court.

V. SUMMARY OF THE ARGUMENT.

A. This Honorable Court Lacks Jurisdiction To Grant Petitioner's Petition For Writ Of Certiorari Under 28 U.S.C. Section 1257.

1. Petitioner did not expressly or timely raise any federal question in the State administrative agency proceedings, and the State administrative agency and the Hawaii Supreme Court neither entertained a federal question nor decided it.

2. Petitioner's assertion that Hawaii's workers' compensation law is violative of Article III and Amendment XIII of the United States Constitution is unfounded and frivolous; the validity of the workers' compensation law as an exclusive remedy for work-connected injuries is well-established.

VI. ARGUMENT.

A. This Honorable Court Lacks Jurisdiction To Grant Petitioner's Petition For Writ Of Certiorari Under 28 U.S.C. Section 1257.

1. A Federal Question Was Neither Timely And Expressly Raised By Petitioner Nor Was It Passed Upon By The Appeals Board And The Hawaii Supreme Court.

It has long been settled that this Court has no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by the state court. Mellon v. O'Neill, 275 U.S. 212, 214-215 (1927). The Court indicated "it is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature." Id. at 215.

The United States Supreme Court indicated in Cardinale v. Louisiana, 394 U.S. 437, 439 (1969), that it was very early established that the Court will not decide federal constitutional issues raised for the first time on

review of state court decisions. This principle was established with Owings v. Norwood's Lessee, 5 Cranch 344 (1809) and the Judiciary Act of 1789, c. 20, Section 25, 1 Stat. 85 vested the court with no jurisdiction unless a federal question was raised and decided in the state court below. 10 Pet. 368, 391. See Bankers Life & Casualty Company v. Crenshaw, 486 U.S. 71, 78-80 (1988); Webb v. Webb, 451 U.S. 493, 495 (1981); Mutual Life Insurance Company of New York v. McGrew, 188 U.S. 291, 308 (1903).

By her own admission, Petitioner acknowledged she failed to timely raise any federal question during the State agency proceedings. "Petitioner's initial attorney failed to recognize that she, as well as all employees in Hawaii, are subjected to cruel and unusual punishment (intentional physical injury) - "purposeless and needless imposition of pain and suffering" - by a State of Hawaii law which said law the State writes into every employment contract. Said attorney failed to raise the constitutional issues and subjected her to the "exclusive" Workers' Compensation Law of Hawaii. After substitution of attorneys, Petitioner raised the issues involved herein by filing her claim as preserved under the Labor Law of California." [Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii, e. Grounds Of Jurisdiction, p. 4 (emphasis added)]. Filing a separate civil action in California did not make timely or otherwise validate the alleged federal constitutional issues in the Hawaii workers' compensation case. This leap in reasoning is entirely misplaced.

Petitioner submitted her State workers' compensation claim for administrative determination on January 19, 1989, eight and a half years ago. Petitioner failed to raise any federal question at the time of the initial hearing before the Director. Petitioner then had the opportunity to present a

federal question not once, but three times to the Appeals Board and failed to do so. Appeal of the Appeals Board's Decision And Order is on the record and the Hawaii Supreme Court reviews the Appeals Board's decision on matters of law only. No new evidence may be introduced to the Hawaii Supreme Court unless clearly, newly discovered and material to a decision of the appeal. (Section 386-88, Hawaii Revised Statutes.)

Petitioner then allegedly raised the federal question for the first time in a supporting affidavit appended to her Motion For Reconsideration to the Hawaii Supreme Court. The Hawaii Supreme Court summarily denied the Motion For Reconsideration on February 5, 1997. The long established general rule is that an attempt to raise a federal question after judgment, upon a petition for rehearing, is too late unless the court actually entertains the question and decides it. Herndon v. Georgia, 295 U.S. 441, 443 (1935). The United States Supreme Court has held that a federal question first raised in a petition for rehearing in a highest state court is raised too late to confer jurisdiction where the petition was denied without rehearing. McGrew, 188 U.S. at 308.

In contrast, the United States Supreme Court has heard state workers' compensation cases regarding successive awards between states when the federal question of application of the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution was raised at the the first state administrative proceedings on the claims. Jurisdictional problems never arose because the federal question was timely asserted and expressly passed upon by the state court. See Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947); Thomas v. Washington Gas Light Co., et al., 448 U.S. 261 (1980). In the instant case, Petitioner had four opportunities to raise any federal

question at the hearings before the Director and the Appeals Board and failed to do so.

Critical to the Court's determination of whether or not to exercise jurisdiction over questions not properly raised below are the policy and practical considerations including comity to the states and the Court's need for a properly developed record on appeal. It is important that state courts be given the first opportunity to consider the applicability of state statutes in constitutional challenges since the statutes may be construed to preserve their constitutionality or the issue may be resolved by an adequate state ground. Raising the federal issue first in state court affords the parties the opportunity to develop the record necessary for adjudicating the issue. The record likely will be inadequate where federal questions are not raised below. Cardinale, 394 U.S. at 439; Crenshaw, 486 U.S. at 79; Webb, 451 U.S. at 500-501.

In the instant case, Petitioner did not raise any federal question at the multiple hearings before the Director and the Appeals Board to afford them a fair opportunity to consider or address the federal question that is sought to be presented here. Careful review of the record shows it is devoid of an assertion of any alleged federal question and that the Director, the Appeals Board and the Hawaii Supreme Court neither entertained the federal question nor decided it.

2. The Validity Of The Hawaii Workers' Compensation Law As An Exclusive Remedy For Work-Connected Injuries Is Well-Established.

The federal questions presented by Petitioner are at best specious. Petitioner's assertion that the Hawaii workers' compensation law, Chapter 386, Hawaii Revised Statutes is violative of Article III and Amendment XIII of

the United States Constitution is unfounded and frivolous. Allegations of involuntary servitude and slavery arising from a contract of hire are a stretch of the logic and are a desperate, last ditch attempt to salvage a claim properly and fully adjudicated by the Director, the Appeals Board and the Hawaii Supreme Court.

The validity of the workers' compensation law as an exclusive remedy for work-connected injuries is well-established. The Hawaii Supreme Court has held that the workers' compensation laws were enacted as a humanitarian measure to create legal liability without relation to fault. The Hawaii Supreme Court has further held that Section 386-5, Hawaii Revised Statutes clearly and unequivocally precludes a contribution action by a third party against an employer on the theory that the employer was a joint tortfeasor. The Hawaii Supreme Court recognized that Section 386-5, Hawaii Revised Statutes was a clear expression of legislative intent to absolve an employer of all liability to an injured employee except that imposed by statute. The Court indicated that the purpose of such legislation is to achieve certainty that an employee will be compensated for all work injuries irrespective of negligence or fault, and certainty with regard to the amount for which an employer shall be liable. Evanson v. University of Hawaii, 52 Haw. 595, 598, 483 P.2d 187, 190 (1971); Kepa v. Hawaii Welding Company, Ltd., 56 Haw. 544, 549, 545 P.2d 687, 691 (1976); Hanagami v. China Airlines, Ltd., 67 Haw. 357, 362-363 688 P.2d 1139, 1143-1144 (1984); Iddings v. Mee-Lee, 82 Haw. 1, 5-6, 919 P.2d 263, 269-270 (1996).

Petitioner attempted to pursue her claim and "preserve" the alleged federal questions by filing a civil action in California. Inclusion by Petitioner in her Appendix to her Petition For Writ Of Certiorari, of correspondence between the United States District Court and the Hawaii Supreme Court and any intimation of collusion as to the outcome of

both actions is repugnant to the integrity of the Courts, California counsel for the parties and the judicial system. The inquiry by the United States District Court as to the status of the pending Hawaii Supreme Court appeal was instigated at the request and urging of Petitioner's legal counsel.

The United States District Court agreed with Employer that Hawaii had a greater and more compelling interest in having its law applied to the case; therefore the exclusive remedy provision of Section 386-5, Hawaii Revised Statutes barred Petitioner's action in California. The United States District Court determined the connection of Petitioner's action to California was tenuous at best and Employer's Motion For Judgment On The Pleadings was granted. Attempting to preserve any alleged federal issue by filing the civil action in California only underscores Petitioner's failure to timely raise those alleged federal issues in the proper Hawaii forum.

VII. CONCLUSION.

This state case, addressing a state issue, interpreting a state statute, was properly and duly adjudicated before the Director, the Appeals Board and the Hawaii Supreme Court. Petitioner failed to raise and timely assert any federal constitutional issues before the Director, the Appeals Board and the record establishes no federal questions were passed upon by either the Director or the Appeals Board or reviewed by the Hawaii Supreme Court. Petitioner's feeble attempt to raise any alleged federal question in the supporting affidavit of the Motion For Reconsideration to the Hawaii Supreme Court falls woefully short of a well-established principle that the federal question must first be raised and passed upon by the state court or agency before the United States Supreme Court may review the matter.

Respondents respectfully request this Honorable Court deny Petitioner's Petition For Writ Of Certiorari for lack of jurisdiction.

DATED: Honolulu, Hawaii, August 21, 1997.

Of Counsel:
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Attorneys for Respondents
UNITED AIRLINES, INC.
and PACIFIC INSURANCE
COMPANY, LTD.

APPENDIX

CASE NO. 18726

IN THE SUPREME COURT OF THE
STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant, v. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster-Appellee.	)	CASE NO. AB 90-182 (2-89-02035) APPEAL FROM DECISION AND ORDER FILED NOVEMBER 2, 1994 AND ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER FILED JANUARY 19, 1995 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

NOTICE AND JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

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CASE NO. 18726

IN THE SUPREME COURT OF THE
STATE OF HAWAII

DIANA FAIRECHILD,	)	CASE NO. AB 90-182
	)	(2-89-02035)
Claimant-Appellant,	)	
	)	APPEAL FROM
v.	)	DECISION AND ORDER
	)	FILED NOVEMBER 2,
UNITED AIRLINES,	)	1994 AND ORDER
INC.,	)	DENYING CLAIMANT-
	)	APPELLANT'S MOTION
Employer-Appellee,	)	FOR
Self-Insured,	)	RECONSIDERATION
	)	AND REOPENING OF
and	)	DECISION OR [SIC]
	)	ORDER FILED
PACIFIC INSURANCE	)	JANUARY 19, 1995 BY
COMPANY,	)	THE LABOR AND
	)	INDUSTRIAL
Insurance Adjuster-	)	RELATIONS APPEALS
Appellee.	)	BOARD
	)	

NOTICE AND JUDGMENT ON APPEAL

TO: FRANK YAP, JR., CHAIRMAN OF THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD:

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii entered on January 16, 1997, the Decision and Order of the Labor and Industrial Relations Appeals Board filed on November 2, 1994 is affirmed.

DATED: Honolulu, Hawaii, February 13, 1997.

BY THE COURT:

/s/ K. Miyamura
Clerk

APPROVED:

/s/ Mario R. Ramil (SEAL)
Justice

CASE NO. 18726

IN THE SUPREME COURT OF THE
STATE OF HAWAII

DIANA FAIRECHILD,	)	CASE NO. AB 90-182
	)	(2-89-02035)
Claimant-Appellant,	)	
	)	APPEAL FROM
v.	)	DECISION AND ORDER
	)	FILED NOVEMBER 2,
UNITED AIRLINES,	)	1994 AND ORDER
INC.,	)	DENYING CLAIMANT-
	)	APPELLANT'S MOTION
Employer-Appellee,	)	FOR
Self-Insured,	)	RECONSIDERATION
	)	AND REOPENING OF
and	)	DECISION OR [SIC]
	)	ORDER FILED
PACIFIC INSURANCE	)	JANUARY 19, 1995 BY
COMPANY,	)	THE LABOR AND
	)	INDUSTRIAL
Insurance Adjuster-	)	RELATIONS APPEALS
Appellee.	)	BOARD
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing document were duly served upon the following individuals by having said copies deposited in the United States mail, postage prepaid, to their last known addresses on this 17th day of January, 1997:

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF
SAN FRANCISCO

DIANA FAIRECHILD, Plaintiff, v. UNITED AIRLINES, INC., and Does 1 through 20, inclusive, Defendants.	)	No.: 976360 COMPLAINT FOR DAMAGES 1. Fraudulent Concealment of Existence of Injuries and Their Connection to Employment 2. Intentional Infliction of Emotional Distress

COMES NOW PLAINTIFF DIANA FAIRECHILD, and by and through her undersigned attorneys, and complains against UNITED AIRLINES, INC., ("UAL") as follows:

1. Plaintiff is and at all relevant times was a resident of the State of Hawaii.

2. Defendant, UNITED AIRLINES, INC., hereinafter "UAL" upon information and belief, at all times herein mentioned was and still is a corporation with their home office and principal place of business in Illinois, and was at all relevant times doing business in California, including the City and County of San Francisco.

3. Defendant Does 1 through 20, inclusive, are sued in this Complaint under the Code of Civil Procedure Section 474. The true names or capacities, whether individual, corporate, governmental, partnership, association or otherwise, of these defendants are unknown to plaintiff who, therefore, sues these defendants by such fictitious names. Plaintiff will amend this Complaint to show their true names and capacities when they have been ascertained. Plaintiff is informed and believes, and on that basis alleges, that each of the defendants designated as a DOE is negligently responsible for the events and happenings referred to in this Complaint, and thereby, caused injuries and damages to the Plaintiff.

COUNT ONE

FRAUDULENT CONCEALMENT OF EXISTENCE OF INJURY AND ITS CONNECTION WITH THE EMPLOYMENT

4. Prior to January 27, 1986, Plaintiff had been employed as a Flight Attendant by Pan American World Airways (PanAm), and then said Airline ceased doing business in the Pacific Rim and UAL acquired these Pacific routes. In anticipation of this acquisition of said air routes,

UAL began interviewing employees of PanAm in December 1985 to serve on these newly acquired routes.

5. On or about December 23, 1985, at Honolulu, Hawaii, Plaintiff and Defendant UAL entered into an employment agreement and as part of said agreement Plaintiff agreed to submit to a pre-employment physical examination, and she did submit thereto, and as part of the agreement she was required to disclose, and she did disclose, all of her past medical history and medical records to UAL, its agents, officers, pre-employment investigators, and physicians.

6. It was also part of said agreement, and understood by UAL and Plaintiff, whether oral or written, that Plaintiff would serve UAL under the supervision, control and command of UAL's designated officers, agents and supervisory personnel superior to her in rank, and that she would obey, without any reservations whatsoever, every command or order that related to the safety, security, well-being, comfort, and convenience of UAL's customers, who were the passengers aboard each and every flight on which she would serve as a Flight Attendant. UAL, its officers and agents, required Plaintiff to agree that she would so serve and obey and that she would accept each and every such order or command and carry out said order or command to the best of her ability. Plaintiff did agree and she did thereafter so obey, serve and carry out all her duties as assigned to her with the belief and conviction that each command and order was in the best interest of the passengers and also in her best interest. She did not know that UAL intended to poison her by spraying the inside of the planes with pesticides and use her as a guinea pig to purportedly show UAL passengers that they were not being sprayed with a deadly and harmful poison. Inherent in said employment agreement, it was understood and agreed that if

Plaintiff was poisoned either by accident or deliberately, that UAL, its officers, agents, including its hired physicians, would disclose to her the fact that she had been poisoned in connection with her employment, and would treat her for the poisoning, and all its sequelae, including both objective and subjective symptoms, and would not allow more serious effects of the poisoning to go untreated.

7. On or about August 12, 1986 plaintiff was ordered to report for duty and to fly from Honolulu to Auckland, New Zealand as a member of the crew working as a Flight Attendant on a UAL plane, flight No. 811, carrying many passengers. On or about August 13, 1986 said UAL plane arrived at Auckland International Airport in New Zealand. Prior to departure to said destination, plaintiff was informed by her supervisor that before debarkation all of the passengers and crew, including herself, everyone on board would be sprayed or subjected to a spray that was "non-toxic to humans." Plaintiff was ordered to give that information to all the passengers. Plaintiff relied upon said representations and in compliance with said command, she so informed the passengers, and in reliance upon said representations and command she prepared to expose herself to the spray fully believing that it was "non-toxic" and harmless to humans. After the plane landed it was taxied to an arrival gate at Auckland International Airport and agents from New Zealand came aboard and emptied six cans of an alleged "non-toxic" aerosol insecticide sprays into the aircraft cabin and said spray landed on the skin, hair, and clothing of plaintiff and filled the air in said cabin where she was stationed so that said spray entered her nose, mouth, throat, lungs, eyes, and all exposed pores of her body. UAL closed all air vents and fresh air intakes to assure the spray would be most effective.

8. That as a result of the poisoning as heretofore stated, plaintiff became extremely ill with headaches, nausea, swollen eyes rimmed with scales, pus-like substance secreting from her eyes, chest pain, tremors, weakness of knees, incontinence, increased sinus congestion, and a general malaise, and upon informing UAL of her condition, UAL sent her to a physician selected by UAL in Auckland, New Zealand, Dr. Simon Barclay.

9. Dr. Barclay was the selected agent and servant of UAL and although he knew that plaintiff had been poisoned, he fraudulently concealed her injury and its connection to her employment, and did not treat her poisoning, thus allowing the condition to be aggravated.

10. Upon Plaintiff's return to Honolulu from Auckland, she was required to be checked by Dr. Wilson, another physician selected by UAL and whose services were paid for by UAL. Dr. Wilson diagnosed plaintiff's conditions as "allergic blepharitis" and he did not treat plaintiff's poisoned condition. Plaintiff never fully recovered from the deliberate poisoning of August 13, 1986 and she was exposed to further pesticides while employed by defendant, which exacerbated her condition, requiring further medical attention. UAL and its officers and physicians continued to inform Plaintiff and others that the spray used in their airplanes was "non-toxic" and harmless to humans and that she had not suffered any injury while in the course of her employment with UAL.

11. Plaintiff was exposed to harmful and deleterious amounts of pesticide while employed as a Flight Attendant for defendant and became seriously ill, which illness and its connection to said employment, was fraudulently concealed from her by defendant and its officers and agents, including physicians, thus aggravating the injuries further. Defendant

is liable to plaintiff for injuries within the meaning of Section 3602(b)(2) of the California Labor Code.

12. It was also inherent and implied in said employment agreement, that UAL would not intentionally poison her, and require her to inform UAL's passengers, whom she was required to serve and guide in all matters of safety, that they were not being deliberately sprayed with a harmful poison. It was also inherent and implied that defendant would not require her to act as a guinea pig to further convince the passengers that she knew that the spray was harmless when sprayed on them or on their children or pets aboard UAL aircraft. Plaintiff was forced, by said demonstration, to emphasize that neither she nor the passengers under her supervision need take any precautions or protect themselves in any way whatsoever from the poisonous pesticides.

13. Plaintiff accepted the duties imposed upon her, believed the instructions and orders were honestly and truthfully given, and she relied upon said representations, orders and instructions and she carried out her duties, without ever suspecting that she was being poisoned, as were the passengers assigned to her care. Plaintiff never suspected that UAL, its officers and supervisors and its hired physicians knew she was being poisoned and injured in connection with the employment. Plaintiff never suspected that defendant knew the passengers were being poisoned and that she was being deliberately poisoned and used as a guinea pig to help UAL deceive and poison UAL passengers.

14. Plaintiff relied upon all of the representations made by UAL, its officers, supervisory personnel, examining physicians, and pre-employment investigators, and her reliance was reinforced by suggestions, instructions, and directions that were in the nature of commands that she

was to be concerned for the safety and comfort of UAL passengers. Plaintiff was told at all times that she was to take extreme caution to avoid doing anything which would in any way inconvenience, harm, or cause discomfort to any of UAL's passengers and she was required to ensure the safety of UAL's passengers at all times, no matter how inconvenient, uncomfortable, annoying, or even hazardous it was to her.

15. Plaintiff was so thoroughly deceived by UAL, its officers, supervisory personnel, and especially by its physicians, that she continued to believe UAL representations until recently when she read for the first time the document, "Passenger Complaint Regarding Spraying of Pesticides on Aircraft", written by Scott Robinson, an official from UAL with authority to disclose this information. Mr. Robinson's memo of December 23, 1987 informed all department heads at UAL that its passengers and crew were being subjected to a very toxic and poisonous spray while they were confined in UAL airplanes and under UAL control and supervision. When Plaintiff first became aware that defendant had known that UAL employees such as herself had been subjected to toxic pesticides and injured in connection with her employment by defendant, she cried uncontrollably for hours and was so profoundly affected she could not eat or leave her bed for days.

16. As a result of the continuous fraudulent representations that the spray was "non-toxic to humans" and the continuous representations by UAL's selected physicians that she was just suffering from symptoms that could be treated with eye-drops and creams, Plaintiff was never treated for the poisoning nor was she informed that she had been deliberately poisoned, with the result that after

some of the more visible symptoms of her eyes disappeared she was ordered back to work and she complied.

15. On each flight after August 13, 1986, her symptoms recurred and she was required to seek medical attention. That UAL through its officers and agents accused her of having an "adjustment disorder" from making the transition from PanAm to UAL, and as because plaintiff did not understand that she had been deliberately poisoned she sought psychiatric help when she was told to do so by her supervisor.

16. Although she was still ill, she attempted to continue working as a Flight Attendant, but with much difficulty.

17. On or about December 19, 1987, on a flight from Honolulu to San Francisco, plaintiff was required to serve aboard a UAL plane that had just previously made stops in New Zealand and Australia before arriving in Honolulu, and said plane had been sprayed with the same poisonous substance on at least three (3) occasions immediately preceding its arrival in Honolulu with the result that its carpeting, seats, fabric, and vents were filled with or covered with a residue of said poisonous spray. That while enroute to San Francisco she began to feel ill with body aches, conjunctivitis, cough, headache and a fever and she was so ill that she spent the entire layover in bed in an effort to be able to make the return flight to Honolulu the next day, on which flight plaintiff's cough and other symptoms worsened.

18. In reliance upon the prior treatments and medication plaintiff went to bed and remained in bed at her home in Honolulu until December 22, 1987, when she was ordered to immediately go to see UAL's physician, Dr. Elmer Johnson for "sick call verification" and in compliance plaintiff did so.

19. Dr. Elmer Johnson took a history from plaintiff and although he knew that she had been subjected to a poisoning he never informed plaintiff thereof and diagnosed her only for what he defined as "cough," "cold," "fever" and "pharynx infected." Dr. Johnson did not prescribe medication for plaintiff's symptoms and told plaintiff to come back to him on December 26, 1987 for a follow-up "sick call verification." When plaintiff checked-in with Dr. Johnson on December 26th, he attributed her condition to "coughing," "mucous," and "respiratory infection." Dr. Johnson did not prescribe medication for these symptoms and he told plaintiff that when she was well she should have her personal physician provide a note stating that she was ready to return to work and then she should bring this note to him.

20. Plaintiff was unable to return to work because she had developed a sensitivity to all antibiotics, sulfa drugs, penicillin, myocins, house dust, newsprint, tobacco smoke, perfumes, powders, insecticides, jet fuel, propane, hair spray, carpet, dairy products, and synthetic fabrics and she became completely disabled as a result of the poisoning, she was subjected to by UAL.

21. On January 24, 1989, without knowing or being informed by UAL or any of its officers, agents or physicians that she had been deliberately poisoned by UAL and without ever being treated for said poisoning, plaintiff filed a worker's compensation claim against UAL alleging that she had been "accidentally" injured in the course of her employment as a result of accidental exposure in her workplace to the chemical D-Phenothrin, the principal chemical in the pesticide used to disinfect UAL's airplanes. Plaintiff believed and claimed that said accidental exposure had taken place on or about December 20, 1987 on the Honolulu to San Francisco flight as aforesaid.

22. Plaintiff's physician Dr. Gregory Yuen, a psychiatrist, diagnosed plaintiff's emotional difficulties or mood swings as the result of an organic, or physical cause, and Dr. George Ewing, an allergy specialist and expert in diagnosing and treating Multiple Chemical Sensitivity (MCS) has diagnosed and treated plaintiff for MCS.

23. UAL by and through its officers, agents, and physicians continued the fraudulent concealment of the deliberate and intentional poisoning of plaintiff and withheld from the Worker's Compensation Board, Hawaii, the fact that UAL had intentionally sprayed a poison on her and into the air, which she was required to breath in an amount her system could not tolerate and as a result she had become poisoned and she was never treated for the poisoning. As a result of said fraudulent concealment of the existence of the injury and additional exposures to more of the poison, she became totally disabled, lost income and all of her employment and much of her retirement and employment benefits, including workers' compensation and rehabilitation benefits, and medical and related expenses, all to her damage in a sum that exceeds the minimum jurisdiction of this Court but which will be established at trial of this matter. In addition, defendant's conduct has demonstrated a criminal indifference to plaintiff's rights so as to warrant the imposition of punitive damages.

COUNT II

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

29. Plaintiff reiterates and incorporates by reference all of the allegations in Paragraphs 1 through 28, above.

30. As a Second Claim plaintiff further alleges that defendant intentionally inflicted great mental suffering on her and physically and emotionally harmed her up to and including March 1, 1995 in order to so ostracize her from her chosen career and employment in the industry, physically, economically as well as socially, that she would never be able to recover, all to her special and general damages in an amount that exceeds the minimum jurisdiction of this Court but as will be established at trial.

31. That the defendant acted willfully and with a design to inflict said damages and said conduct warrants the imposition of punitive damages as punishment for such gross misconduct and as a deterrent to defendant and others in the future.

WHEREFORE plaintiff asks for judgment against defendant UAL for the following:

A) Special damages according to proof;
B) General damages;
C) Punitive damages;
D) Attorney's Fees;
E) Other such further relief.

Dated: February 21, 1996, San Francisco, California.

LAW OFFICES OF
MELVIN BELLI

/s/ Thomas J. Kaster
Thomas J. Kaster
Attorneys for Plaintiff
DIANA FAIRECHILD

LABOR AND INDUSTRIAL RELATIONS
APPEALS BOARD

STATE OF HAWAII

DIANA FAIRECHILD,	)	CASE NO. AB 90-182
	)	(2-89-02035)
Claimant-Appellant,	)	
	)	
vs.	)	
	)	
UNITED AIRLINES, INC.,	)	
	)	
	)	
Employer-Appellee, Self-Insured,	)	
	)	
and	)	
	)	
PACIFIC INSURANCE COMPANY,	)	
	)	
	)	
Insurance Adjuster-Appellee.	)	
	)	

ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER

Having heard Claimant-Appellant's motion for reconsideration and reopening of decision or [sic] order filed December 1, 1994, having considered Employer/ Insurance Carrier's memorandum in opposition filed

January 6, 1995, and its request to strike certain materials filed by Claimant after November 2, 1994, and being fully apprised,

IT IS HEREBY ORDERED that:

1. Claimant's motion for reconsideration and reopening of decision or [sic] order is denied;

2. The exhibits numbered one through six and attached to Claimant's motion for reconsideration and reopening shall be strickened from the record;

3. The Honolulu Star Bulletin article attached to Claimant's letter of November 3, 1994, addressed to the Chairman, shall be strickened from the record; and

4. The Hawaii Trial Lawyers Association article attached to Claimant's letter of December 8, 1994, addressed to the Chairman, shall be strickened from the record.

Dated: Honolulu, Hawaii, January 19, 1995.

/s/ Frank Yap, Jr.
FRANK YAP, JR., Chairman

/s/ Carol K. Yamamoto
CAROL K. YAMAMOTO, Member

/s/ Charles T. Akama
CHARLES T. AKAMA, Member

STATE OF HAWAII

DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS

DISABILITY COMPENSATION DIVISION

DIANA E. FAIRECHILD P. O. Box 300 Makawao, Hawaii 96768, Claimant.	)	DECISION
UNITED AIRLINES Terminal Box 35 Honolulu International Airport Honolulu, Hawaii 96819, Employer, Self-Insured.	)	Case No: 28902035 D/A: December 20, 1987 SSN: 102-36-4758
PACIFIC INSURANCE COMPANY, LTD. P. O. Box 1140 Honolulu, Hawaii 96807.	)	

Such investigation of the above-entitled matter having been made as he deems necessary, the Director makes the following

FINDINGS OF FACT

On January 24, 1989, the claimant filed an Employee's Claim for Workers' Compensation Benefits (WC-5), indicating she sustained an accident on December 20, 1987. Claimant described her accident as secondary exposure to pesticides via carpets, seat fabrics, etc., and direct pesticide exposure in Australia and New Zealand while a flight attendant. As a result, claimant complained of dizziness, nausea, etc., when exposed to smoke, chemicals, pesticide environmentally allergic, pain in the liver, depression, motor impairment, burning around the body, headache, conjunctivitis, blepharitis, memory loss, confusion, coughing, back pain and nervous breakdown.

The employer denied the above claim filed by the claimant. Consequently, a hearing to address the issue of compensability was held on September 27, 1989.

The parties presented their respective positions and testimonies at the September 27, 1989 hearing. An extension agreement beyond the statutory limit of 60 days was agreed upon at the hearing to allow for additional medical discovery as well as post-hearing position papers.

The claimant presented the following synopsis: 1) The claim dated January 19, 1989 should be found compensable that claimant suffers from multiple chemical sensitivity due to exposure to pesticides for over 20 years while with Pan Am, her previous employer, and again with United Airlines (hereafter United), her latest employer. Claimant's last exposure with United aggravated this condition to the point that she is no longer able to work; 2) George M. Ewing, M.D., and William J. Rea, M.D., both opined that claimant suffers from multiple chemical sensitivity. Furthermore, Dr. Ewing, claimant's treating physician since 1985, substantiated claimant's position and opined that claimant's

exposure to volatile chemicals while with United aggravated her problems to the point where claimant was unable to function and work; 3) Claimant has been disabled from this condition since December 25, 1987 and has not been released to work. Therefore, claimant is due temporary total disability for the aforementioned period. Moreover, claimant should be referred for vocational rehabilitation services since her attending physician, Dr. Ewing, indicated that claimant cannot return to work as a flight attendant; 4) Claimant did provide the employer with proper notice of her injury pursuant to Section 386-81, HRS, and, therefore, her claim for workers' compensation benefits should be deemed timely under Section 386-82, HRS.

The employer's argument consisted of the following conclusions: 1) The claimant did not sustain a personal injury under Section 386-3, HRS. There was no causal relation between claimant's current condition with any incident or condition of her employment with employer, United, that occurred on or about December 20, 1987. Accordingly, claimant's present condition cannot be deemed to have arisen out of and in the course of her employment and thus, claimant sustained no personal injury as defined under Section 386-3, HRS; 2) The employer indicated that the medical evidence submitted and relied upon by claimant is unreliable to trigger the presumption. The employer added Eric G. Comstock, M.D., and John T. McDonnell, M.D., have shredded the theory advocated by Drs. Ewing and Rea regarding claimant's condition. Therefore, since Dr. Ewing's and Dr. Rea's diagnoses flow from unproven and unscientific speculation, their opinions should be given little probative weight; 3) If claimant's exposure to decontaminants is deemed to be a work-related injury, said injury is a result of employment with Pan Am. The employer stated that Dr. Ewing's diagnosis of chemical

sensitivity was made in February 1985. Claimant, in fact, filed an Employee's Claim for Workers' Compensation Benefits (WC-5) against Pan Am in 1985 for her exposure but subsequently withdrew the claim voluntarily in December 1985; 4) Claimant provided insufficient notice of injury pursuant to Section 386-81, HRS. Claimant's claim for chemical sensitivity was dated in 1989. However, claimant was aware of her condition at least by December 1985 upon Dr. Ewing's diagnosis for claimant's condition or at least by August 1986 upon treatment of her condition. Since her claim was not filed within two years, her claim for compensation should be time barred pursuant to Sections 386-81 and 386-82, HRS; 5) If claimant's condition is related to her employment, claimant has sustained subsequent aggravations for which the employer is not liable. Claimant sustained acute nonindustrial exacerbations on March 8, 1988 and on December 6, 1988, which she reacted unusually.

Upon review of the entire matter, the Director finds the following: 1) Claimant did not sustain any injury pursuant to Section 386-3, HRS, for multiple chemical sensitivity during her employment with United. If claimant intended to pursue this matter as a work-related injury/illness, she should have pursued it against Pan Am, since the records reveal claimant had this condition as far back as February 1985. The records further reflect that Dr. Ewing was a proponent that claimant pursue this matter against her then employer, Pan Am, as reflected in Dr. Ewing's February 5, 1986 letter to claimant; 2) Claimant did not sustain aggravations of her injury/illness at United. Instead, the exacerbations claimant experienced from her chemical sensitivity while with United are held to be recurrences of symptoms which began with her exposure at Pan Am. The chronicity of claimant's problems with chemical sensitivity

have not heightened since she treated with Dr. Ewing in February 1985. Claimant was still employed with Pan Am at the time. The Straub Clinic and Hospital records transcribed on February 13, 1985 from Dr. Ewing already noted the same characterization of symptoms then compared to now. Claimant already presented burning of her throat, pain in her head, disorientation, frontal headaches, eye irritation, and pain and muscle spasms of the neck in 1985, while still employed with Pan Am; 3) The claimant's inability to resume her employment as a flight attendant is a result of the added adjustment disorder with mixed emotional features that has developed over time. The records reveal that claimant was referred by Dr. Ewing to Greg Yuen, M.D., after encounting stressors in both her personal and work situation. Dr. Yuen then disabled claimant from returning to work with the employer from December 31, 1987. If the claim for adjustment disorder is related to the chemical sensitivity condition, then this psychological component of her claim must be held a compensable consequence of her original injury that occurred with Pan Am, since there was no injury per se with United.

Therefore, the Director concludes that claimant has not sustained any work-related injury/illness during her employment with United on December 20, 1987. Claimant's Employee's Claim for Workers' Compensation Benefits (WC-5) filed January 24, 1989 is hereby denied.

Thereupon the Director makes the following

DECISION

1. The claim for compensation filed January 24, 1989 is hereby denied.

BY ORDER OF THE DIRECTOR, FEBRUARY 23, 1990.

/s/ Clyde Imada for
Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or his county representative within twenty days after a copy of this decision has been sent.